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No. 95-995

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MURPHEY FAVRE, INC.,
WASHINGTON MUTUAL SAVINGS BANK,
GREGORY ONDRAK, JAMES ROYAN and
DOUGLAS SPRINGER,

Petitioners,

v.

PAUL M. LYNN, on behalf of himself and all similarly situated persons, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA, THE HONORABLE JOHN S. HENSON, PRESIDING JUDGE,

Respondents.

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Does the Full Faith and Credit Clause of the United States Constitution prohibit certification of a class in a state court lawsuit ("Action 2") when a final judgment dismissing with prejudice the claims of the absent class members in Action 2 has been entered in another class action ("Action 1") pending in the court of another state?

2. Must the court in Action 2 give Full Faith and Credit to a finding by the court in Action 1 that it had personal jurisdiction over all members of the class, including the absent members of the putative class in Action 2, when the proposed class representative in Action 2 expressly contested, and lost, the jurisdiction issue in proceedings before the court in Action 1?

II. PARTIES

Murphey Favre, Inc.; Gregory Ondrak; James Royan; and Douglas Springer were relators below and are petitioners here. Washington Mutual Savings Bank filed a joinder as a relator below and is a petitioner here.[1]

The District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, the Honorable John S. Henson, Presiding Judge, and Paul M. Lynn, seeking to act on behalf of himself and all similarly situated persons, were respondents below and are the respondents here.

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[1] Pursuant to Supreme Court Rule 29.1, Petitioners disclose the following information. WM Financial, Inc. is the parent corporation of Petitioner Murphey Favre, Inc. Washington Mutual Inc. is the parent corporation of Petitioner Washington Mutual Savings Bank. Neither of the Petitioner corporations has any nonwholly-owned subsidiaries.

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Petitioners,

v.

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all similarly situated persons, and THE DISTRICT
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COUNTY OF MISSOULA, THE HONORABLE
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

Murphey Favre, Inc., Washington Mutual Savings Bank, Gregory Ondrak, James Royan and Douglas Springer respectfully petition for a writ of certiorari to review the judgment of the Supreme Court for the State of Montana

dismissing Petitioners' application for a Writ of Supervisory Control and thereby allowing the underlying action to proceed as a class action.

V. OPINIONS BELOW

Petitioners seek a Writ of Certiorari for review of the Montana Supreme Court's order dated September 26, 1995 (the "Dismissal Order"), which terminated original proceedings before that court in *Montana ex rel. Murphey Favre, Inc. v. District Court of Fourth Judicial Dist.*, No. 95-381 (the "Montana Writ Proceedings"). In dismissing the Montana Writ Proceedings, the Montana Supreme Court declined Petitioners' request for interlocutory and de novo review of an Opinion and Order (the "Certification Order") issued on July 27, 1995, by the trial court in proceedings captioned *Lynn v. Murphey Favre, Inc.*, No. 93-2-06519-2 (Mont. 4th Jud. Dist., Missoula County) (the "Montana Action"). The Certification Order certified a class in the Montana Action with respondent Paul M. Lynn as the sole class representative. The Certification Order was entered despite the entry on December 15, 1994, by a Washington State Court of a Final Judgment and Order of Dismissal With Prejudice (the "Final Judgment") and an Order Denying Montana Plaintiff's [Mr. Lynn's] Motion To Dismiss for Lack of Jurisdiction Over Montana Investors (the "Jurisdiction Order") in *Wright v. Murphey Favre, Inc.*, No. 93-2-06519-1 (Wash. Super. Ct., King County) (the "Washington Action"). None of these orders were published; copies are included in the Appendix.[2]

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[2]The Dismissal Order is at Appendix 1a-2a. The Certification Order is at Appendix 3a-10a. The Final Judgment is at Appendix 11a-18a. The Jurisdiction Order is at Appendix 19a-27a.

VI. JURISDICTIONAL STATEMENT

The Montana Supreme Court's Dismissal Order, entered on September 26, 1995, constitutes a final judgment terminating the Montana Writ Proceedings. *Fisher v. District Court of 16th Judicial Dist.*, 424 U.S. 382 (1976). Accordingly, this Court has jurisdiction over this Petition. *See* 28 U.S.C. §1257(a).

VII. RELEVANT CONSTITUTIONAL PROVISION

The constitutional provision pertinent to this Petition is United States Constitution, Article IV, Section 1:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

VIII. STATEMENT OF THE CASE

A. Overview of the Case.

This Petition arises from the failure of the Montana state courts to afford Full Faith and Credit to a final judgment rendered by a court of the state of Washington. The Final Judgment in the Washington Action approved a class action settlement and authorized distribution of a $12 million settlement fund in return for the defendants' receiving complete releases and full and final peace from the claims of the settlement class. Despite the Final Judgment, the Montana trial court subsequently certified a class in the Montana Action consisting largely of persons who had already released their claims and received settlement distributions in the Washington Action.

In adopting the Certification Order, the Montana trial court necessarily determined that the Washington court

had improperly exercised personal jurisdiction over the Montana members of the Washington settlement class. Appendix 6a-7a. Respondent Lynn—the sole proposed Montana class representative—had already litigated and lost that issue before the Washington court. Appendix 23a-26a.

Petitioners seek relief from the Montana courts' orders because they violate the Full Faith and Credit Clause of the United States Constitution and fundamentally disregard the strong public policy favoring finality and enforcement of negotiated class action settlements. Petitioners request that this Court accept review of the Dismissal Order and direct the Montana Supreme Court to enter an order prohibiting the Montana Action from being maintained as a class action. Entry of the requested order *now* is necessary so that Petitioners will not be forced to face the time, significant expense and uncertainty of having to litigate again class action claims from which they have already been released.

The relevant proceedings in the Washington Action, the Montana Action and the Montana Writ Proceedings are described in more detail below.[3]

B. Parallel Securities Class Actions Were Filed in Washington and Montana.

The Washington Action was a class action asserting claims for violations of state securities and consumer protection statutes and common law on behalf of *all*

[3] For the Court's reference, a consolidated chronology of the pertinent motions, filings and orders in the Washington Action, the Montana Action and the Montana Writ Proceedings from May 1994 through September 1995 is set forth at Appendix 173a-177a.

individuals (regardless of their state of residence) who purchased certain securities ("Homestead Bonds") from petitioner Murphey Favre. The Washington Action was filed and served on the defendants in March 1993.[4]

The Montana Action is a class action that also asserts claims under state securities and consumer protection statutes and common law based on purchases of Homestead Bonds. The Montana Action was initiated in February 1993, but was not served on Petitioners until July 1993. The class in the Montana Action is a subset of the class in the Washington Action—specifically, Montana residents who purchased Homestead Bonds from Murphey Favre and persons who purchased Homestead Bonds through Murphey Favre's office in Montana. Appendix 133a.

C. The Washington Settlement Extinguished All Class Members' Claims.

1. A Class-Wide Settlement Was Reached in the Washington Action.

In May 1994, the parties in the Washington Action reached a class-wide settlement. Under that settlement, the defendants created a $12 million settlement fund in return for releases from and dismissal with prejudice of the claims of all class members who did not request exclusion from the class. Appendix 153a-154a. Both the Stipulation of Settlement and the Final Judgment

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[4] Plaintiffs in the Washington Action eventually filed three versions of their Complaint. In each version, the class was defined as "all purchasers" of Homestead Bonds. *See* Appendix 157a-172a (excerpts). The Stipulation of Settlement entered by the parties incorporated this definition. Appendix 152a-153a. This definition was then carried forward into the Final Judgment. Appendix 11a.

carried forward the broad scope of the class definition previously alleged in the complaints in the Washington Action by defining the "Class" to mean:

> [P]laintiffs and all Persons who purchased Homestead Bonds from Murphey Favre at any time during The Class Period or such Persons who, as of the end of The Claim Period . . . hold the causes of action alleged in the Second Amended Complaint, but excludes any Person who has previously settled with and released any of the Defendants from claims arising out of or relating to the purchase of Homestead Bonds from or through Murphey Favre.

Appendix 11a, 152a-153a.

Notice of the settlement and a Proof of Claim and Release form were mailed directly to the class members. Appendix 182a-195a. Notice was also published in national and regional publications, including the Missolula, Montana newspaper. Appendix 12a. In both the class notice and the Proof of Claim form, class members were advised of the opportunity to request exclusion from the class. Appendix 12a-13a, 183a. The only persons who opted out of the Washington settlement class, however, were the named plaintiffs in the Montana Action. Appendix 15a, 18a. Every other person or entity in the settlement class in the Washington Action was deemed to have given full releases to the defendants, including Petitioners. Appendix 15a.

The Washington court preliminarily approved the settlement in August 1994 and entered the Final Judgment on December 15, 1994. Appendix 11a-12a, 17a.

2. Respondent Lynn Raised Personal Jurisdiction Objections Before the Washington Court.

On November 28, 1994, respondent Lynn filed a motion in the Washington court to dismiss the claims of *all* class members who either resided in or made their Homestead Bond purchases in Montana (the "Jurisdiction Motion"). Appendix 23a. Mr. Lynn contended that the Washington court lacked personal jurisdiction over Montana bond purchasers. Appendix 21a-22a.

After receiving affidavits, exhibits and legal memoranda from the interested parties, the Washington court heard oral argument on the Jurisdiction Motion on December 2, 1994. At the end of the hearing, the Washington court denied the Jurisdiction Motion. The Washington court determined that it had personal jurisdiction over the Montana bond purchasers because the notice and opt-out procedures used in the Washington Action satisfied the standards set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Appendix 25a-26a.

On December 15, 1994, the Washington court entered the Jurisdiction Order memorializing its earlier denial of Mr. Lynn's Jurisdiction Motion. The Jurisdiction Order reiterated that the question of the Washington court's personal jurisdiction over the Montana bond purchasers had been fully and fairly litigated:

> Counsel for Mr. Lynn and their clients have had a full and fair opportunity to raise their objections to (a) the form of the Class Notice, (b) the adequacy of the class representatives in this case with respect to Montana purchasers of Homestead Bonds and (c) this Court's personal jurisdiction over the absent class members. Counsel for Mr. Lynn and their clients have submitted the Jurisdiction Motion

> . . . and Mr. Youtz appeared and argued in hearings before this Court on November 17, 1994 and December 2, 1994.

Appendix 24a. After full consideration of the issues, the Washington court rejected Mr. Lynn's jurisdiction objections:

> 2. *Jurisdiction.* However, because Counsel for Mr. Lynn have raised questions concerning this Court's jurisdiction, the Court has considered the merits of the Jurisdiction Motion. The Court rules that it has personal jurisdiction over the absent class members in this case, including the Montana purchasers of Homestead Bonds.

Appendix 25a. Mr. Lynn did not seek appellate review of the Jurisdiction Order.[5]

3. The Washington Court Entered a Final Judgment Dismissing the Class Members' Claims.

The Washington court also entered its Final Judgment approving the class-wide settlement on December 15, 1994. Consistent with the court's ruling in the Jurisdiction Order, the Final Judgment set forth findings supporting its personal jurisdiction over the class members:

> The Notice and the Summary Notice constitute the best notice practicable under the circumstances and provided individual notice to all Class Members who could be identified by reasonable effort. The Notice

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[5] The Washington court also determined that Mr. Lynn lacked standing to raise the objections because (a) he had requested exclusion and was therefore not a class member and (b) he had presented no evidence of any authority to request exclusion from the Washington class on behalf of any Montana class members. Appendix 25a.

> properly informed persons in the Class of their rights under the Settlement, including, without limitation, their right to opt out and pursue individual actions, and the consequences of failing to opt out. . . . [T]he best notice practicable under the circumstances was in fact given and constituted valid, due, and sufficient notice to members of the Class, complying fully with due process and Rule 23 of the Superior Court Civil Rules.

Appendix 12a-13a.[6]

Having determined its personal jurisdiction and having determined that the settlement was fair, reasonable and adequate, the Washington court entered the Final Judgment. The Final Judgment dismissed the class members' claims with prejudice and granted the defendants (including Petitioners) full releases and repose from those claims. Appendix 14a-15a. Neither Mr. Lynn nor any class member appealed either the Jurisdiction Order or the Final Judgment.

Excluding the named plaintiffs in the Montana Action (who opted out) and persons who had previously settled with Petitioners in other actions, the Washington settlement class included Montana bond purchasers holding 123 accounts in which they purchased Homestead Bonds. Appendix 178a-181a. Montana Bond purchasers actually filed claims for 112 of those accounts in the Washington settlement, leaving only 11 accounts in which no response was made. Thus, more than 91 percent of the eligible accounts filed claims in the Washington Action.[7] *Id.*

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[6] Washington Civil Rule 23 is identical to Fed. R. Civ. P. 23.

[7] Some of the Montana bond purchasers bought Homestead Bonds in more than one account and many of the accounts were jointly held. Thus, the number of *accounts* participating in the

[footnote continued]

Each Montana bond purchaser filing a claim in the Washington settlement *expressly* submitted to the Washington court's jurisdiction:

> I submit this Proof of Claim and Release under the terms of the Stipulation of Settlement described in the Notice. I also submit to the jurisdiction of the Superior Court of the State of Washington for King County (the "Court") with respect to my claim as a Class Member and for purposes of enforcing the release set forth herein.

Appendix 189a.

In addition, each of the Montana bond purchasers who filed claims in the Washington settlement expressly released the defendants (including Petitioners) from the claims being asserted in the Montana Action:

> I acknowledge full and complete satisfaction of all Released Claims as that term is defined in the Notice and the Stipulation and do fully, finally and forever release and discharge . . . the [Released Parties] from all Released Claims . . . that have been, could have been, or in the future could be asserted . . . based upon the facts, transactions, events, occurrences, acts, misrepresentations or omissions arising out of, or in any way related to the purchase of Homestead Bonds . . . .

Appendix 189a-190a.

The releases and dismissal with prejudice of claims were binding upon *all* members of the Washington settlement class, whether or not they filed claims. Appendix 14a-15a. Thus, the defendants entered into the Washing-

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Washington settlement is the easiest measure of the level of participation. More than $752,000 has been paid to the holders of those accounts.

ton settlement with the expectation that all claims regarding Homestead Bonds would be extinguished except those asserted by the *named* plaintiffs in the Montana Action.

D. The Montana Courts Improperly Disregarded the Washington Court's Final Judgment.

1. Mr. Lynn Requested Class Certification in the Montana Action.

Despite litigating and losing the personal jurisdiction issues before the Washington court, respondent Lynn asked the Montana court to certify a class of Montana bond purchasers in the Montana Action. Mr. Lynn designated himself as the sole class representative. Appendix 133a. Mr. Lynn filed his class certification motion in the Montana Action on December 15, 1994, *after* his Jurisdiction Motion had been *denied* by the Washington court and on the very same day the Washington court issued the written Jurisdiction Order and the Final Judgment. Appendix 174a-175a.

In direct disregard of the Washington court's rulings, Mr. Lynn defined his proposed class to include the Montana bond purchasers whose claims had been extinguished by the Final Judgment and the releases. Appendix 133a.

2. The Montana Court Certified a Class Despite the Final Judgment.

Petitioners objected to class certification in the Montana Action based on their rights under the Full Faith and Credit Clause. *See, e.g.,* Appendix 64a-67a, 101a. Petitioners placed into evidence before the Montana court the Final Judgment, the Jurisdiction Order and the briefing and evidence filed by Mr. Lynn in the Washing-

ton Action to demonstrate that Mr. Lynn was raising before the Montana court *precisely* the same jurisdictional arguments he had raised in the Washington Action. Appendix 65a-66a.[8]

The Montana trial court rejected Petitioners' arguments and certified Mr. Lynn's proposed class in the Montana Action. Appendix 7a-10a. The Certification Order recognized that the Washington court had decided the jurisdictional issue. Appendix 6a-7a. The Montana court disregarded the Final Judgment's jurisdictional findings, however, because it apparently disagreed with the Washington court's conclusion:

> The Washington Court *determined that the class notice in that action was sufficient*, and did not require comparisons of class member rights under different state laws. While the court agrees with this precept, it continues to find it problematic that many Montana purchasers apparently were never made aware at all of a parallel Montana action. . . . This Court has attempted to ensure that the Montana purchasers be apprised of the Montana action, thereby allowing them a choice. They have not been so notified, through no fault of Plaintiffs' counsel, *and this in itself may be sufficient to invalidate the Washington court's exercise of jurisdiction over the Montana bond purchasers.*

Id. (emphasis added).

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[8] On December 5, 1994, the Montana court entered an Order Allowing Communication With Montana Bond Purchasers. Appendix 135a-137a. Petitioners' motion to vacate that order (which authorized the notification of Montana purchasers that the Montana Action was pending before the certification of a class) was denied in the Certification Order.

3. The Montana Supreme Court Declined to Review the Certification Order.

Petitioners sought interlocutory and de novo review of the Certification Order by commencing the Montana Writ Proceedings before the Montana Supreme Court. Appendix 28a-42a. In their Application for Writ of Supervisory Control, Petitioners again raised the Full Faith and Credit issues by placing them squarely before the Montana Supreme Court:

> Is the Washington Court's Final Judgment, entered after full briefing and oral argument in Washington by both sides in the present action, which dismissed the claims of all members of the Homestead Class who did not properly opt out of the Washington action, including those residing in Montana, entitled to Full Faith and Credit by the courts of the State of Montana?

Appendix 31a.

Without reaching the merits of the issues, the Montana Supreme Court dismissed the Montana Writ Proceedings, leaving the issue for resolution on appeal only after disposition of the entire case below. Appendix 1a-2a. These proceedings were timely commenced following entry of the Dismissal Order.

IX. REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Applicable Precedent and Undermines Important Public Policies.

In this case, the Montana courts erred by failing to give preclusive effect to the resolution of claims and jurisdictional issues embodied in a final judgment entered in the court of a sister state. In disregarding the Washington

court's Final Judgment, the Montana courts violated the Full Faith and Credit Clause of the United States Constitution. This constitutional provision is "central to our system of jurisprudence" because it eliminates the "uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-04 (1982).

In a longstanding series of cases, this Court has established "the general rule that a judgment is entitled to full faith and credit—even as to issues of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee v. Duke*, 375 U.S. 106, 111 (1963). Because the litigation that produced the Washington court's Final Judgment fully and fairly disposed of the claims of all the absent class members in the Washington settlement class, certification of a class asserting those claims in the Montana Action was clear error.

In certifying the class in the Montana Action, the Montana court apparently revisited the question of whether the Washington court had personal jurisdiction over Montana bond purchasers. This inquiry was also improper, because respondent Lynn actually litigated (and lost) before the *Washington* court his objection to the Washington court's exercise of personal jurisdiction over the Montana bond purchasers. Under *Durfee*, the "permissible scope" of the Montana court's inquiry was limited to whether the jurisdiction issues were actually litigated and finally decided in Washington. *Id.* With the uncontroverted record demonstrating the Washington court's full consideration of the jurisdictional issues, the Montana court was required to give Full Faith and Credit to the

Washington court's jurisdictional ruling when Mr. Lynn applied for class certification in the Montana Action.

The Montana courts' failure to afford Full Faith and Credit to the Final Judgment runs counter to at least three fundamental public policies with significant consequences to civil litigants.

First, the decision violates the policy described in *Durfee* and other cases as the doctrine of "jurisdictional finality." *Durfee*, 375 U.S. at 113. This doctrine ensures that once the question of a court's jurisdiction has been finally decided, it will not be litigated again with the concomitant waste of judicial and private resources. *See Underwriters Nat'l Assurance Co.*, 455 U.S. at 703-04.

Second, the decision undercuts the public policy favoring negotiated resolutions of disputes. This policy, like jurisdictional finality, is strongly favored because it conserves the resources of the courts and the parties.

Third, the decision calls into question the efficacy of settlements in multistate state court class actions. Enforcement of class action settlements is "strongly favored because class actions are uncertain and costly. A defendant without assurance of [the settlement's] binding effect [is] likely to be subjected to a 'heads I win, tails you lose' approach." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum v. Shutts, 96 Yale L.J. 1, 36 (1986). This patently improper result is precisely the situation confronting Petitioners, who now face renewed litigation with a class of plaintiffs whose claims were dismissed and released in the Washington settlement.

This Court has recently acknowledged the importance of questions regarding the scope of class action settle-

ments. *See Matsushita Elec. Indus. Co. v. Epstein*, 115 S. Ct. 2576 (U.S. 1995) (granting *certiorari* on Full Faith and Credit issues arising from a state court class action settlement). This case presents the Full Faith and Credit issues in the context of the exact evil sought to be avoided by the drafters of the Constitution—inconsistent results arising from relitigating an issue previously decided by a state court.[9]

For all these reasons, this Court should review and reverse the Dismissal Order and direct that the Montana Action cannot be maintained as a class action.

B. The Montana Courts' Decisions Directly Conflict With Applicable Precedent Concerning the Preclusive Effect of Contested Jurisdictional Rulings.

On its face, the Final Judgment dismisses and bars further prosecution of the claims of all class members *except* those persons who properly requested exclusion from the Washington class. Appendix 14a-15a. Absent a jurisdictional defect, the Full Faith and Credit Clause dictates that the Final Judgment must be afforded preclusive effect and bar the class members' claims. Thus, the sole possible justification for the Montana courts' permitting class action proceedings in the Montana Action is a finding that the Washington court lacked jurisdiction over the Montana bond purchasers. As is

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[9] In *Epstein*, this Court granted certiorari on the question: "Whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims." *See Epstein*, 115 S. Ct. at 2576 (granting petition on question No. 1 stated in the certiorari petition).

demonstrated below, however, the Montana court was precluded from making that determination on Mr. Lynn's motion because the Washington court's rejection of Mr. Lynn's contentions is also entitled to Full Faith and Credit.

1. Full Faith and Credit Must Be Afforded to Jurisdictional Rulings When Jurisdiction Is Contested Before the Court Issuing the Judgment.

A final decision by a state court concerning its jurisdiction is binding on a party that litigates the issue before that court. Having litigated jurisdictional issues once, the parties are not entitled to seek a different result in the courts of another state, because the issuing court's jurisdictional ruling is entitled to Full Faith and Credit under the United States Constitution. *See, e.g., Durfee*, 375 U.S. at 111.

In *Durfee*, Justice Stewart, writing for a unanimous court, found that prior precedent "unambiguously" established the applicability of Full Faith and Credit to a court's findings concerning its own *personal* jurisdiction:

> We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

375 U.S. at 111-12 (quoting *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931)). Because jurisdiction had been finally decided once, further litigation of that question was prohibited by the Full Faith and Credit Clause. *Id.*

The doctrine of jurisdictional finality should likewise preclude Mr. Lynn from collaterally attacking the Washington court's jurisdiction over the Montana bond purchasers. *See Underwriters Nat'l Assurance Co.*, 455 U.S. at 706-07 (party who appears before the court in a class action cannot later collaterally attack jurisdiction when the issue was litigated in the class proceedings). Mr. Lynn was barred from questioning the Washington court's jurisdiction to dismiss the claims of the Montana bond purchasers because those issues were resolved by the Washington court. Appendix 25a-26a. Upon completion of an inquiry into whether the jurisdiction issues were litigated in Washington, the Montana court was obligated to defer to the Washington court's ruling and to deny Mr. Lynn's class certification motion. *Durfee*, 375 U.S. at 111-12.[10]

2. Mr. Lynn Fully and Fairly Litigated the Issue of Personal Jurisdiction Before the Washington Court.

Respondent Lynn unquestionably raised and litigated before the Washington court the question of the Washington court's personal jurisdiction over the Montana bond purchasers. As recited in the Jurisdiction Order, the

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[10]The Montana court's finding that the Washington court lacked personal jurisdiction was improper for an additional reason. Each person or entity filing a claim specifically and expressly submitted themselves to personal jurisdiction before the Washington court by signing the Proof of Claim and Release. *See* Appendix 189a-190a. Thus, in addition to the consent which the *Shutts* decision implies from the failure to request exclusion from the class, those persons filing claims *actually* consented to jurisdiction in Washington. Of the 123 Montana accounts which were part of the Washington Class, only 11 did not expressly consent to the Washington court's personal jurisdiction. Appendix 178a-181a.

issue "came before the Court on the Motion to Dismiss for Lack of Jurisdiction Over Montana Investors . . . filed by . . . counsel for Mr. Paul Lynn." Appendix 20a. Respondent Lynn and the parties to the Washington Action filed testimony, exhibits and legal memoranda and presented oral arguments to the Washington court. Appendix 20a-21a. Appropriately, the jurisdictional dispute centered around whether the notice and opt-out procedures used in the Washington Action were sufficient to satisfy the due process standards specified by this Court. *See Shutts*, 472 U.S. at 811-12.

In *Shutts*, this Court held that to bind absent class members in a settlement, four conditions must be satisfied: (1) the absent class members must receive adequate notice of their rights (here, their rights under the Stipulation of Settlement) and an opportunity to be heard, (2) they must be given an opportunity to "opt out" of the class, (3) they must be adequately represented by the proposed class representatives, and (4) the forum state must have sufficient minimum contacts with the claims asserted on behalf of the class in order for the court to apply its substantive law to those claims. 472 U.S. at 811-12, 818-22. The Jurisdiction Order leaves no doubt that Mr. Lynn contested the question of whether the Washington court had personal jurisdiction over absent class members under *Shutts*:

> Counsel for Mr. Lynn . . . have had a full and fair opportunity to raise their objections to (a) the form of the Class Notice, (b) the adequacy of the Class representatives with respect to Montana purchasers of Homestead Bonds and (c) this Court's personal jurisdiction over the absent class members.

Appendix 24a. The Montana court's inquiry into the personal jurisdiction of the Washington court should

have begun and ended with this record. *Durfee*, 375 U.S. at 111-12 ("[A] judgment is entitled to full faith and credit . . . When *the second court's inquiry discloses* that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.") (emphasis added).[11]

Likewise, the Final Judgment clarified that the Washington court *rejected* Mr. Lynn's personal jurisdiction objections. The Washington court found constitutionally sufficient notice and the required opportunity to opt out had been afforded to the class. Appendix 12a-13a. The Washington court also ruled that all class members had been adequately represented. *Id.* Finally, the Washington court found the settlement fair and reasonable in light of the applicable law. *Id.* Thus, the Final Judgment established each element necessary for the Washington court to exercise personal jurisdiction over the absent class members under *Shutts*.

The record before the Montana court unequivocally demonstrated that the Washington court issued a decision, binding on Mr. Lynn, concerning its personal jurisdiction. Under *Durfee* and *Baldwin*, the debate over the Washington court's authority to dismiss the class members' claims should then have come to an end. The Montana trial court's independent evaluation of the jurisdiction question was error, as was the Montana Supreme Court's failure to rectify the lower court's mistake.

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[11] If the Montana court needed further proof that Mr. Lynn was replowing the ground he had covered in Washington, that evidence was provided in Petitioners' briefing on the Full Faith and Credit issue. That briefing demonstrated Mr. Lynn had raised exactly the same arguments in Washington and Montana on the jurisdiction question. *See* Appendix 65a.

Notwithstanding the undisputed evidence that Mr. Lynn had litigated and lost the *exact same* jurisdictional objections, the Montana courts certified (and let stand the certification of) the Montana class because they disagreed with the conclusions reached by the Washington court. *See* Appendix 7a ("[T]his in itself may be sufficient to invalidate the Washington court's exercise of jurisdiction . . . .").

However, as this Court established in *Durfee*, a court cannot overturn the jurisdictional findings of a foreign court merely because it disagrees with the foreign court's rulings. Once Mr. Lynn chose not to appeal the Jurisdiction Order and the Final Judgment, he was bound by them. He was not free to litigate the jurisdiction issues over again in Montana, with the hope that a more favorable ruling would be obtained there. The Montana courts placed their imprimatur on Mr. Lynn's tactics by certifying and confirming a Montana "class." This Court should not allow those decisions to stand.

C. Supreme Court Review Is the Only Meaningful Method of Effecting the Policies Underlying the Full Faith and Credit Clause.

1. Public Policy Favors Final Resolutions and an End to Litigated Matters.

As explained in *Durfee*, the Full Faith and Credit Clause embodies the national public policy in favor of preventing repeated, unnecessary and expensive litigation of matters that have been finally decided between the parties. As this Court has stated:

> Public policy dictates that there be an end of litigation; that those who have contested an issue

> shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.

Baldwin, 283 U.S. at 525-26. Stated another way, "[o]ne trial of an issue is enough." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939).

Indeed, the policy favoring finality is so strong that courts have uniformly accorded Full Faith and Credit to settlements which extinguish claims arising from the same factual situation that were not even asserted in the underlying complaint. *See Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991) (court-approved state court class action settlement bars class members' claims through issue preclusion and by reason of the release language in the judgment; Full Faith and Credit must be afforded to both). In *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982), the Second Circuit expressly held that:

> [I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim *based on the identical factual predicate* as that underlying the claims in the settled class action *even though the claim was not presented and might not have been presentable in the class action.*

(Emphasis added); *see also National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 18 n.7 (2d Cir. 1981); *Epstein v. MCA, Inc.*, 50 F.3d 644, 663 (9th Cir.) (courts have authority to release claims arising from factual predicate underlying a class action, even if the claims were not set forth in the complaint), *cert. granted,*

in part sub nom. Matsushita Elec. Indus. Co. v. Epstein, 115 S. Ct. 2576 (U.S. 1995).[12]

This constitutionally-based public policy is intended to prevent precisely the kind of forum shopping undertaken by respondent Lynn when he moved to certify a class in the Montana Action. In the words of the old saw, Mr. Lynn is entitled to only one bite at the jurisdictional apple. Having litigated and lost the jurisdiction questions before the Washington court, Mr. Lynn is precluded by the *Durfee/Baldwin* policy of jurisdictional finality from litigating those questions again. To permit repeated litigation of those questions would unnecessarily burden the courts and the parties to the dispute.

2. The Montana Courts' Orders Undermine the Public Policy in Favor of Negotiated Settlements.

Under the laws of the United States, as well as the laws of Montana and Washington, fundamental public policy favors resolving litigation through negotiated settlements. *See Air Line Stewards v. Trans World Airlines*, 630 F.2d 1164, 1166-67 (7th Cir. 1980), *aff'd sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) ("Federal courts look with great favor upon the voluntary

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[12] Unlike *Epstein*, there is no dispute here that the claims in the Washington Action and the Montana Action arise from the same factual predicate. In addition, no federal claims were asserted or available to plaintiffs in the Washington Action or the Montana Action because both cases were brought more than three years after the class members purchased the securities at issue. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 (1991) (absolute three-year cutoff for claims arising under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and SEC Rule 10b-5, 17 C.F.R. §240.10b-5).

resolution of litigation through settlement. This rule has particular force regarding class action lawsuits.") (citations omitted); *State Highway Comm'n v. Arms*, 518 P.2d 35, 37 (Mont. 1974) ("Compromises are favored by the Court. This is such a universal rule as to require no citation of authority."); *Haller v. Wallis*, 573 P.2d 1302, 1305 (Wash. 1978) ("The law favors settlements, and consequently it must also favor their finality."). By entering into negotiated settlements, the parties achieve certainty as to their rights and obligations and avoid the monetary and other costs of continued litigation.

Mr. Lynn's attempt to avoid the consequences of the Final Judgment, if allowed to stand, will jeopardize Petitioners' realization of the specific benefits of the settlement negotiated, approved and implemented in the Washington Action. Petitioners entered into the settlement in the Washington Action for the express purpose of *ending* the litigation with the members of the class who did not request exclusion. Appendix 13a-14a. Not one of the persons whose claims were dismissed has questioned the fairness of the settlement or the Washington court's authority to effect it. Indeed, more than 91 percent of the accounts represented by the Montana class have accepted distributions from the Washington settlement after the account holders expressly submitted to the Washington court's jurisdiction. Appendix 178a-181a. Mr. Lynn, who is free to pursue his individual claims, should not now be allowed to disrupt the judicially-approved settlement that Petitioners have reached with the Washington settlement class.

3. Predictability and Finality Are Especially Critical in Class Action Proceedings.

Because of the unique nature of class action litigation, this Court has provided express guidance concerning the procedures that must be followed to exercise personal jurisdiction over absent class members in multistate class actions pending in state courts. *See Shutts*, 472 U.S. at 811-12. Defendants who enter into settlements and comply with the *Shutts* guidelines are entitled to protection of their "distinct and personal interest in seeing the entire plaintiff class bound by res judicata . . . ." *Shutts*, 472 U.S. at 805.

Petitioners were motivated to settle the Washington Action in substantial part because it would effect a release of the claims of all class members who did not opt out of the settlement. Defendants in securities class actions frequently settle them because of the extraordinary expense required to defend these cases and the significant legal exposure involved. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 498-99 (1990) (class action settlements are often neither voluntary (because trial is not considered a practical alternative) nor accurate (because the merits have little impact upon the terms of the ultimate settlement)); Anthony Q. Fletcher, *Curing Crib Death: Emerging Growth Companies, Nuisance Suits, and Congressional Proposals for Securities Litigation Reform*, 32 Harv. J. on Legis. 493, 500-03 (1995) (meritless securities fraud class actions carry substantial settlement value because (1) they cost more to defend than to prosecute, (2) early

resolution through summary judgment is unlikely, and (3) they generate adverse publicity).[13]

In short, defendants often settle securities class actions for reasons *other* than the merits. In doing so, the defendants are seeking to avoid ongoing litigation costs and to obtain full, final and complete resolution of the class' claims.

Stringent enforcement of the constitutional requirement of Full Faith and Credit between the courts of different states is crucial to this goal. Through multistate class action settlements, the parties establish a uniform resolution, rather than one based on local views or biases. However, such settlements are *only* likely to occur when the settling defendants are certain that the settlement will bring an effective end to the costs and burdens of the litigation. *See Shutts*, 472 U.S. at 805. The interests of judicial efficiency would be impermissibly ignored were parties able to jump from state to state in a quest for what they deem the most favorable result.

By permitting the Montana Action to proceed as a class action, the Montana courts have severely undermined the basis for the settlement in the Washington Action. The Montana courts' rulings not only violate the

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[13] *See also* Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 686 (1994) (five factors drive parties to settle class actions that are entirely devoid of merit: (1) risk aversion, (2) high potential damages, (3) hourly based compensation of plaintiffs' lawyers, (4) agency problems, and (5) insurance and indemnification rules). Courts have joined commentators in acknowledging the substantial likelihood that securities class actions will result in settlement. *See In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (recognizing "familiar axiom that a bad settlement is almost always better than a good trial").

Constitution, but also are effectively unappealable because Petitioners are once again subject to the factors—not based on merits—that led to the Washington settlement in the first place.

4. Resolution of Jurisdictional Issues Is Appropriate in Interlocutory Proceedings.

This Court has previously recognized the importance of promptly correcting errors concerning a lower court's jurisdictional rulings. *See Fisher v. District Court of 16th Judicial Dist.*, 424 U.S. 382, 385 (1976). The risk arising from inconsistent decisions on those issues presents a sufficiently important question to allow interlocutory review. *Id.* This case presents a situation of equal urgency. To preserve the sanctity of final judgments and to affirm the sovereignty of state courts, this Court should accept review of this critical issue at this stage of the proceedings.

This is particularly true because continued litigation under the class action cloud is not a difficulty that can be remedied appropriately on appeal. The class action context of the case will necessarily alter the dynamics, both in trial and in settlement negotiations. This Court should grant review now.

X. CONCLUSION

The Montana courts failed to give Full Faith and Credit to the Washington court's rulings in violation of the United States Constitution. This failure will, if not corrected, deprive Petitioners of the full benefit of the arm's-length class action settlement approved by the court in the Washington Action.

This Court should reverse the Montana Supreme Court's denial of a Writ of Supervisory Control and direct that court to enter an order prohibiting the Montana Action from proceeding with respect to claims on behalf of any person or entity that did not request exclusion from the settlement class in the Washington Action.

Respectfully submitted,

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